
Date: December 12, 1995

Case No.: 95-ERA-18

In the Matter of:

ADAM MCNIECE,
Complainant

v.

NORTHEAST NUCLEAR ENERGY CO.,
Respondent

and

Case No. 95-ERA-47

In the Matter of:

ADAM MCNIECE,
Complainant

v.

NORTHEAST NUCLEAR ENERGY CO.,
and
BARTLETT NUCLEAR, INC.,
Respondents

William E. McCoy, Esquire
Heller, Heller & McCoy
For the Complainant

David J. Elliot, Esquire
Day, Berry, & Howard
For Northeast Nuclear Energy Co.

Glen E. Coe, Esquire
Rome, McGuigan, Hoberman, Sabonosh & Klebanoff, P.C.
For Bartlett Nuclear, Inc.

BEFORE: JOEL R. WILLIAMS, Administrative Law Judge

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RECOMMENDED DECISION AND ORDER

These two cases concern complaints filed by Adam McNiece under the employee protection provisions of the Energy Reorganization Act, as amended, 42 U.S.C. §5851 (the "Act") and the regulations promulgated thereunder, 29 C.F.R. Part 24.

The complaint in 95-ERA-18, which is dated September 12, 1994 and alleges discriminatory actions taken by Northeast Nuclear Energy Co. (hereafter, "Northeast) and/or Bartlett Nuclear, Inc. (hereafter Bartlett) on or before that date, is stamped received "WH New Haven AO" on October, 19, 1994. The Assistant District Director, U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division (hereafter "Wage and Hour) determined that the Complainant had not made a bona fide showing that protected activity was a contributing factor to the alleged unfavorable personnel actions and dismissed the complaint without investigation. The Complainant appealed this action by requesting a hearing.

A hearing in this 95-ERA-18 was convened on February 23, 1995.[1] It was then adjourned, without taking testimony, because of the Complainant's desire to withdraw this complaint and to file anew complaint based on alleged discriminatory acts occurring subsequent to September 12, 1994. However, my recommendation that the complaint in 95-ERA-18 be dismissed with prejudice was not concurred in by the Secretary of Labor and the case was remanded to me for a hearing.

The Complaint in 95-ERA-47 is dated May 22, 1995 and alleges retaliatory actions by the Respondents in regards to an "early lay-off" in December 1994 and the refusal to rehire him in April 1995. Following an investigation by Wage and Hour, it was determined that the Respondents jointly had discriminated against the Complainant because of activities protected under the Act. Accordingly, the Respondents were ordered to reinstate the Complainant in the position of Senior Health Technician with back pay from his lay off in December 1994, to revise his performance evaluation, to offer a public apology and to pay punitive damages in the amount of $100,000.00.

Both Northeast and Bartlett requested a hearing in regards to Wage and . 'Hour's latest determination. Said hearing was combined with the hearing that the Secretary had ordered in 95-ERA-18 and was held on August 29, 30 and 31, 1995, in New London Connecticut.

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The record was left open following the hearing for the submission of Bartlett's published policy regarding performance evaluations.[2] The Bartlett's Personnel Policy Manual and its September 27, 1994 Memo re "Employee Evaluation Forms" have now been submitted and, without objection, are admitted to the record

as Respondent's Exhibits (R-) 99 and 100, respectively.

The record was left open also to allow for the filing of briefs. The parties have filed simultaneous briefs which will be made part of the record. In addition, the Respondent's have filed a joint response brief with a motion that this be also considered as part of the record. There being no objection from the Complainant, the motion is granted.

FINDINGS OF FACTS

What follows is what I consider to be the pertinent facts in this case based on the testimony and documentary evidence. Where necessary because of a dispute in the evidence, the reasoning for my finding is furnished.

1. Northeast, a subsidiary of Northeast Utilities Service Corporation (NUSCO), operates a three unit commercial nuclear generating plant, known as Millstone Station, in Waterford, Connecticut. Millstone Unit One is a single-cycle plant, Unit two is a combustion engineering pressurized water reactor, and Unit 3, the newest and most modern, is a large-scale Westinghouse, four-loop, pressurized-water reactor. The Connecticut Yankee Power Station (CY) is also included in the NUSCO group.

2. Peter Strickland, who holds a Bachelor of Science degree in nuclear physics and has many years of experience in the nuclear energy field, has been the Health Physics[3] Manager at Millstone since May 1994.

3. Ronald Sachettello, is currently assistant to the NUSCO Vice-President, stationed at CY. From 1985 to 1994 he was the @ e Radiation Protection Supervisor at Millstone Three. He has a masters of Science degree and over 20 years experience in the nuclear energy industry.

4. Jonathan Burdick is currently a Senior Health Physics Technician at Millstone One. From September to December 1994 he was a Radiation Protection Supervisor at the RAD materials warehouse, and in such capacity supervised the Complainant during

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a Unit Two outage.[4]

5. Stanley Horner is a Northeast Senior Radiation Protection Technician. During part of the September to December 1994 Millstone Two outage he was an upgraded Senior Health Physics Technician in the RAD materials warehouse. He was responsible in such capacity for supervision of the Complainant.

6. Bartlett is an organization which contracts to provide technical personnel to 70 of the 115 operational reactors nationwide as well to foreign nuclear power plants and governmental agencies. Generally, this is done on a temporary

basis to cover periods when increased personnel are needed such as during outages. Bartlett maintains a database of approximately 15,000 to 17,000 technicians and during a peak period may employ up to three thousand of these people. Northeast became a client of Bartlett in about September 1991.

7. Jerry W. Hiatt is Bartlett's Group Vice-President for Technical Services. He has been employed by Bartlett since 1985 and his duties include the management of the personnel department.

8. James D'Angelo has been employed by Bartlett since March of 1994 as a Personnel Administrator. His duties involve the hiring of staff for various nuclear power companies around the country, including Millstone.

9. Eric Bartlett is also a Personnel Administrator. He has been employed at Bartlett since November 1989 and shares responsibility with D'Angelo for staffing at Millstone.

10. Judi Tingley is another Bartlett Personnel Administrator. The facilities which she staffs include Yankee and Pilgrim Nuclear Power Station in Plymouth, Massachusetts.

11. Mike Conwell has been Site Coordinator for Bartlett at Millstone since September 1991.

12. Adam Mc Niece worked at Millstone for three months in 1985 and returned there in 1990 as an employee of Power Systems. He continued working there for Bartlett when they took over the contract. His initial job was as a Decontamination (Decon) Technician.[5] After 3 months he was promoted to a Junior Health Physics Technician. He was then promoted to a Senior Health Physics Technician (SHP)in May 1993.

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13. Nileen Drzewianowski has worked for various companies as a SHP for 16 or more years. She has worked for Bartlett since they became the contractor at Millstone and is currently engaged as a procedure writer at Millstone.

14. Prior to January 8, 1994, the Complainant had raised concerns with "line management" regarding (a)the level at which exposure recording devices were being worn by personnel; and (b) that because of an engineering flaw, a large amount of primary coolant was backflowing through the drainage system into the environmental sump. He subsequently brought these concerns to the attention of the Nuclear Regulatory Commission (NRC) and to L.A. Chatfield, Director of NUSCO's Nuclear Safety Concerns Program (NSCP).

15. Effective January 8, 1994, the Complainant was reclassified as a Decon Technician at $16.00 per hour and on January 26, 1994 he was reclassified as a base level Decon Technician at $13.00 per hour. Sachettello testified that he was

not aware of the Complainant having raised any nuclear safety concerns at this time. He stated that the reclassification was due to the Complainant's being kept on at his request "as a bonus" to do clean-up work in a non-nuclear area after the Unit 3 outage had ended. However, he also indicated that sometime in early 1994, the Complainant was utilized to replace permanent Unit 3 technicians who were doing temporary duty for a Unit 1 outage.

16. As stated in a February 15, 1994 letter from the NRC the Complainant contacted staff members of this agency on January 26 and 27, 1994 about "unspecified irregularities" at Millstone 3. It was noted that he did not want to supply specific information with regard to the alleged problems without a grant of confidentiality by NRC.

17. On April 29, 1994, Chatfield wrote to the Complainant in reference to the concern raised by him with NSCP on January 27, 28 and 31, 1994. These concerns were identified as relating to a problem his spouse, a NUSCO employee, had with offensive comments received from her supervisor, the Complainant's involvement in seeking corrective action on her behalf, and his subsequent "demotions." Chatfield noted that NSCP had ascertained that he was the only Bartlett employee who had been demoted and that during the period involved 15 other employees had been promoted. As a result of a meeting between Chatfield and the then Manager of Radiation Protection it was determined that although the Complainant's demotion was due to an

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organizational downsizing in support of the MP1 outage, the basics of this downsizing was not communicated to him properly when it occurred. Accordingly, it was decided to pay the Complainant his former rate retroactively and, with the concurrence of the Unit 3 radiation protection supervisor,[6] to reinstate him to his former position.

18. In May 1994, the Complainant "brought up a procedural compliance problem with some camera equipment.,, He also raised this issue with NSCP and NRC.

19. The Complainant was terminated on May 27, 1994 due to a reduction in force (RIF). On or between that date and April 22, 1994, 31 other Bartlett employees at Millstone were terminated. Per Sachetello, this was due to the permanent Unit 3 employees return from their temporary Unit 1 outage assignments.

20. In a June 13, 1994 letter to the Complainant, Chatfield referred to a meeting they had on May 31, 1994 concerning the layoff. After referring to their previous conversations during which it noted that NESCO was going to significantly reduce dependence on contract vendor services in 1994, Chatfield went on to state:

> "This is what I believe to be the case. The data I reviewed shows that the Senior Health Physics Technicians that remain in the area traditionally

associated with HP Operations have anywhere from 4 to 9 years of experience at the senior level. In addition the only senior remaining in the *base* complement of contract vendor employees, which you were in fact part of, is shift qualified. Since your experience at the senior level is less than the complement remaining, as well as the fact that you are not shift qualified, I consider the determination of your layoff to be handled in a fair and equitable way with no regard whatsoever to the [camera] incident you noted.

21. In an August 27, 1994 letter to the Complainant, Donald B. Miller, Jr., Senior Vice President-Millstone, stated, in substance, that his investigation of the data surrounding Complainant's demotion in January 1994 and termination in May 1994 did not disclose that either was based on supervisory harassment or discrimination. Miller indicated that downsizing in the form of using less contractor personnel was to expected at Millstone in the future. He noted further that he had reviewed the issues relative the camera, teletectors and containment sump

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and found no need for corrective action or discipline.

22. The Complainant applied to Bartlett for a SHP position for a Unit 2 outage due to commence in September 1994. The processing of staffing for this outage began at the end of July 1994 and involved scoring the candidates under various categories based on the information contained in their resumes. When attempting to score the Complainant, D'Angelo noticed that his resume was outdated. He contacted Conwell and was faxed a more recent resume on August 4, 1994. The resume is printed on Bartlett's stationary and bears the Complainant's certification under the date of February 14, 1994 that he had reviewed and initialed each page and verifies that it is true and accurate to the best of his knowledge. In reviewing the resume D'Angelo noted a discrepancy regarding the date that the Complainant was promoted to a SHP.[7] Consequently, the processing of his application was "put on hold." The situation was ultimately resolved on September 19, 1994[8] when D'Angelo received a letter from the Complainant authorizing Bartlett to revise his resume. By then the staffing of the outage, with a starting date of September 26, 1994, had been completed. However, one position subsequently became vacant and the Complainant was employed to fill the same on September 27, 1994. This was done with the concurrence of Strickland, who was aware at the time that the Complainant had raised safety concerns referable to the sump, camera and teletectors.[9]

23. A Millstone Staffing Summary, dated October 12, 1995, notes that there were a total of 78 positions filled of which 52 were SHPs and 13 were decon techs. On the basis of their respective scores, the Complainant ranked in the 46th position among the SHPs.

24. Testimony of Strickland, Burdick, Horner and Conwell is to the combined effect that the Complainant's attitude appeared

to have changed upon his return to Millstone in September 1994. Previously he was an enthusiastic, hardworking employee who was eager to learn the operations of his job. Upon his return for the Unit 2 outage he was strongly opinionated and confrontational. Certain incidents of the Complainant's becoming involved in disagreements with other employees were observed or reported to one or more of the witnesses. These concerned the Complainant's disagreement with a gas powered fork lift operator over the operation of such equipment in an enclosed warehouse. He reportedly argued with another employee over the playing of a radio. These incidents are documented in the record as occurring between October 6 and 11, 1994. The record includes also what

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are reportedly contemporaneous memorandums prepared by Conwell of conversations he had with the Complainant regarding his failure to properly use a time clock recently installed by Bartlett. The memorandums are dated between October 5 and 10, 1994 and November 28, 1994.

25. The record also includes a written complaint from an employee, John J. DeGostin, dated October 11, 1994, concerning a confrontation he had with the Complainant the previous day. DeGostin opined that the Complainant exhibited unstable behavior at the time. Subsequently, Burdick, Strickland and other Northeast management employees met with Conwell to discuss the Complainant's fitness for duty. It was determined to turn the matter over to Bartlett for any evaluation it deemed necessary.

26. Upon being advised of Northeast's concerns about the Complainant's conduct, Hiatt went to-Millstone and met with him privately on October 12, 1994. During the course of the meeting, the Complainant expressed his belief that "people were out to get him" because of his having raised some nuclear safety concerns. They also discussed the DeGostin incident. Hiatt testified:

> "Well, I summarized the meeting by kind of telling Adam that, you know, from -- that harassment can go both ways. He may have perceived that he was being harassed, but at the same time some actions he was taking may be perceived as being harassing by other people. I told him that I would resolve, I would look into the DeCostin issue, which was the -- as I remember from talking to Adam, the biggest concern at that time, and then that I would ensure that he was treated fairly as best I could by all Bartlett personnel."

27. Following his meeting with the Complainant, Hiatt determined that he could "still continue to discharge his duties without question to the physical plant security." Hiatt stayed in touch with Conwell in regard to the Complainant and recalled that "things seemed to be improving."

28. The Complainant raised a concern regarding the radiologically safe handling of "modesty garments" during his employment at the Unit 2 outage. He raised such concern with his line supervisor, the NSCP, and alternately with the NRC.

29. During the course of Wage and Hour's investigation of the complaint in 95 EPA 18, Conwell, Chatfield and D'Angelo were interviewed. Conwell reportedly told the investigator that he

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had no problems with the Complainant except for the warnings he and others had been given concerning the time clock. Conwell could not recall this conversation. The Investigator's report does not identify the date on which Conwell was interviewed. However, as the report makes no mention of the Complainant's being terminated again in December 1994, it is reasonable to assume that the investigation took place prior to this event and I so find.

30. According to Strickland's testimony, the Unit 2 ran into a problem in November 1994 which resulted in the outage being converted to a "shutdown." At first there was uncertainty as to when the outage would resume, but by the beginning of December it "became obvious that the work had completely stopped." Accordingly, they "started marching through a de-staffing campaign up to a couple days before Christmas."

31. NRC conducted an announced radiological controls inspection at Millstone on December 6-9, 1994 and issued a report of the same in on January 13, 1995. One of the ares examined was the sump. The inspector concluded that the likelihood of contaminated liquid from the ESF sumps flowing under the Unit 3 containment basement was relatively remote but that to preclude the potential for future backf1ow, the licensee was planning to install a "weir system" in January 1995. The issue of placement of dosimetry devices was also examined and the conclusion indicated that any prior problems in this regard had been addressed and there was no need for any repositioning of the devices. The inspector examined camera equipment known to be taken into and removed-from controlled areas but could not identify any removable surface contamination.

32. The Complainant was terminated on December 9, 1994. He maintains that there was still substantial work being done in connection with the outage in the PAD warehouse to which he was assigned.

33. The "Termination Sheets" referable to the Millstone December 1994 layoffs when compared to the "Millstone Staffing Summary"of record indicates that four other SHPs, each with a score higher than the Complainant's, were terminated on or before December 9.[10] Only one SHP with a score less than the Complainant's was retained past that date, i.e., Jeffrey Graham with a score of 232, who was terminated on December 23. In all, there were approximately 60 employees terminated during December of which I can identify about 23 as being SHP's.

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34. Conwell completed a Bartlett "Employee Evaluation Form"

referable to the Complainant on December 9, 1994. The form calls for a grading of between 1 and 5 in the categories of Job Knowledge, Attitude, Interaction with others, Professional Conduct (Language, appearance, etc.), Attendance, Overall Performance and Recommended Rehire. A grade of 3 is considered marginal and a grade of 2 is considered marginal. Bartlett Site Coordinators were informed on September 27, 1994 that the evaluation forms were to be completed at the conclusion of an outage, once every 6 months for long-term assignments or "as needed" to highlight exceptional or marginal performance. Criteria to be used included the following:

> -Evaluations must be objective. Personal relationships must not interfere with your ability to evaluate the workers on-the-job performance -If you are not familiar with the individual's performance obtain input from Lead Techs or responsible utility supervisors.[11]

A Bartlett Personnel Policy manual for employees at Millstone of record does not include any reference to the employee evaluations. The manual does indicate that employees are encouraged to bring forth safety concerns to clients and notes the availability of Home Office technical staff to assist with such concerns.

35. Conwell rated the Complainant as a 11211 in the Attitude, Interaction and Professional Conduct categories and a 1131, in all the others. He added the Comments that there was constant complaints that Bartlett and Northeast were unfair to him and that their employees were against him. Her added that the Complainant did not get along with co-workers, did not understand the reason for a time clock and could not be talked to without going into a tantrum. Testimony of Strickland, Burdick and Horner is to the effect that they did not participate in this evaluation and/or were not privy to the information contained therein. The evaluation form is not signed by the Complainant, who claims that it was not shown to him.

36. Hiatt testified that there was no provision for further review by Bartlett officials of a supervisor's evaluation but he amy talk to the supervisor if the employee feels the evaluation was done unfairly and Hiatt felt a personality clash is involved. Based on what he knows, he did not believe that the Complainant had a basis for having his December 9, 1994 evaluation changed.

37. Drzewianowski testified the Conwell regularly

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complained to her that the Complainant was "being a pain in the ass" by causing him extra work in preparing documentation and appearing in court. She did not furnish a specific time frame for these repetitive conversations.

38. The record includes a Memo to Strickland from Dennis Regan, Radiation Protection Supervisor, Millstone 3, dated January 5, 1995 in which he noted that industry indicators show the availability of more contractor applicants for outage support

than required and recommended that a five year minimum experience standard be applied at Millstone for SHPs. He also suggested that SHPs be required to have "strong interpersonal skills" in addition to their experience.

39. Hiatt attended a meeting at Millstone on January 24, 1995 regarding the staffing for a Unit 3 outage which was scheduled to begin in March or April 1995. The discussions centered on Northeast's desire, which had been expressed initially in the fall of 1994, to improve the quality of employees they were getting from Bartlett in order that they could improve their reputation with regulators and peer groups by moving from an average performer to one of excellence. Based on his knowledge as to the criteria adopted at other utilities, Hiatt recommended that SHPs be required to have a minimum of 5 years experience in this position (5 year rule). Strickland testified that Northeast instructed Bartlett to adopt the 5 year rule for SHPs at this meeting. He further testified that discussion was had at that time of his belief that no one be hired for the outage who had less than a 11311 on any element of Bartlett's Performance Evaluation (rule of 3) should not be hired.

40. The Complainant applied to Bartlett for an outage which was to start at CY in January 1995. Tingley testified that he did not score high enough to be hired for this outage based on the CY scoring system which placed heavy emphasis on "returnees" to this facility. Tingley continued that she had offered the Complainant a position at Pilgrim, which because of its location was difficult to staff and, accordingly, had lower hiring standards. The Complainant testified that he declined the offer because it meant that he would be separated from his family and, also, because he anticipated being hired for the Unit 3 outage.

41. Regan and Conwell were among the witnesses that Northeast anticipated calling at the hearing scheduled on February 23, 1995.[12]

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42. D'Angelo and E. Bartlett testified to the combined effect, that they first received instructions that the 5 year rule was to be applied for SHPs hired for the Unit 3 outage on March 2, 1995.

43. Drzewianowski related conversations she had with Conwell about the Unit 3 outage in which he purportedly told her, "We all know why we have the 5 year rule. Its so they can keep Adam McNiece out." Conwell denies having made the statement.

44. E. Bartlett stated he was then informed of the rule of 3 on March 7, 1995 during a conference call with Strickland and Regan. E. Bartlett stated that he informed the Complainant sometime prior to March 20, 1995 that he could not be hired as a SHP for Millstone because of the 5 year rule and again offered him employment at Pilgrim. He pointed out to the Complainant

that working at Pilgrim would enhance his experience and offer him the opportunity to better his evaluation. The Complainant again declined employment at Pilgrim but asked instead to be placed at Millstone for a decon tech position. E. Bartlett subsequently obtained the Complainant's December 9, 1994 performance evaluation from Bartlett's files and ascertained that the Complainant would not qualify under the rule of 3.

45. D'Angelo informed the Complainant on March 29, 1995, that he could not be hired at Millstone because of the rule of 3. The Complainant complained to D'Angelo on that date that the evaluation reflected a "personal thing between Conwell and him and that he wanted Bruce [Bartlett, the owner] to override the 2's. On April 5, 1995 the Complainant called D'Angelo to inquire as to whether Bruce was going to override Conwell's evaluation. D'Angelo responded that the evaluation would stand.

46. A Millstone Staffing Summary, dated May 2, 1995, notes that a total of 125 positions had been filled of which 79 were SHPs and 29 were decons. An entry under the date of March 22, 1995 notes that the hiring of Non-BNI technicians had started. It is reported therein under the date of March 27, 1995 that Knacks lawyer told Bartlett that two SHPs, who were already on site, could not be hired for the outage as they do not meet the greater than S year criteria.

CONCLUSIONS OF LAW

Section 5851(a) of the Act as amended effective October 24, 1992, provides, in pertinent part, that no employer may discharge any employee or otherwise discriminate against any employee with

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respect to his compensation, terms, conditions or privileges of employment because the employee has notified his employer of an alleged violation of the Act or has commenced a proceeding thereunder, "Employer" includes a licensee and/or its contractors or subcontractors.

Pursuant to §5851(b)(1) complaints alleging violation of the §5851(a) must be filed within 180 days after the claimed violation occurs.

Under §5851(b)(3), added by the 1992 amendments, the Secretary may determine that there has been a violation of the whistle blower provisions of the Act only if the complainant has demonstrated that any protected behavior "was a contributing factor in the unfavorable personnel action alleged in the complaint." The amended subsection provides further that relief may not be ordered if the employer "demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior."

In a case of first impression interpreting the respective burdens of proof established by the 1992 amendments, *Dysert v. Florida Power Corp.*, 93-ERA-21 (August 7, 1995), the Secretary held:

"The language added to the EPA in 1992 permits the Secretary to find violation 'only if the complainant has demonstrated' that protected activity contributed to the employer's adverse action. The ordinary ,meaning of the word 'demonstrate,' which is not defined in the statute, is 'to prove or make evident by reasoning or adducing evidence.' The American Heritage Dictionary, Second College Edition, 1982. Significantly, the new statutory language does not authorize finding a violation if the complainant demonstrates a *prima facie* case of retaliation. In contrast, other paragraphs of the same section explicitly provide for different degrees of evidentiary burden applicable at certain stages of processing an ERA complaint. Subsection 5851(b)(3)(A) provides that the Secretary may not conduct an investigation 'unless the complainant *has made a prima facie showing*' that retaliation was a motivating factor in the adverse action (emphasis added by the Secretary)..., and subsection (D) directs the Secretary not to order relief for the complainant if the employer demonstrates *by clear and convincing evidence* that it would have

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taken the same unfavorable personnel action in the absence of' protected conduct. (Emphasis added by the Secretary.) It is an accepted rule of evidence that '[g]enerally, the party with the burden of persuasion must establish the elements of its case by "a preponderance of the evidence." occasionally, constitutional or policy considerations impose a greater burden; in such instances a party will be required to prove its case "by clear and convincing evidence"...' Jones on Evidence, 7th Ed. 1992, §3.8 The language and structure of the statute show that Congress did not intend to alter the degree of persuasiveness" *id.*, by which a complainant must prove his case." (FN omitted)

Thus, to prevail, the Complainant must establish by the preponderance of the evidence that he (1)engaged in protected activity; (2) that either or both of the Respondents were aware of the activity; (3) that either or both of the Respondents took actions against him which are proscribed by the Act; and (4) that the protected activity contributed to the adverse action. Assuming that he has done so, the Respondents can still bar the granting of any relief by demonstrating through "clear and convincing evidence,, that it would have taken the adverse action in the absence of any protected activity.

The burden of showing something by a *preponderance of the evidence*, "simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence." *Concrete Pipe & Products v. Construction Laborers Pen. Tr.*, U.S. , 113 S.Ct 2264, 2279 (1993). A *clear and convincing* standard requires a greater degree of certainty, Id. at 2279, albeit less than proof *beyond a reasonable*

doubt, *Ulrich v. City of Crosby*, 848 F.Supp 861, 868 (D.Minn. 1994). In order to satisfy the *clear and convincing* standard the evidence must be sufficient to satisfy the fact finder that the existence of the fact is "highly probable." *Id.* at 868.

The 1992 amendments adopt the Secretary's prior interpretation of the Act that expressing nuclear safety concerns to one's employer constitutes protected activity. Filling a complaint under the Act with the Department of Labor constitutes commencing a proceeding under the Act and is also a protected is activity. *Frady v. Tennessee Valley Authority*, 92-ERA-19 & 34 (Sec'y Oct 23, 1995), slip op. at 14.

A complainant is not required to show that he has raised unique nuclear safety concerns in order to be protected under the Act (*DeFord v. Secretary of Labor*, 700 F. 2d 281 (6th Cir. 1983)), and it does not matter whether his allegations are

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ultimately substantiated (*Carson v. Tyler Pipe Co.* 93-WPC-11 (Sec'y March 24, 1995) slip op. at 8, (under the Water Pollution Control Act)). The complaint need only be "grounded in conditions constituting reasonably perceived" safety concerns, (*Minard v. Nerco Delamar Co.*, 92-SWD-1 (Sec'y Jan. 25, 1995) slip op. at 8 (under the Solid Waste Disposal Act)), and there is no requirement that the complainant have no other motive for filing the complaint (*Carter Electrical District No.2 of Pinal County* 92-TSC-11 (Sec'y July 26, 1995) (under the Toxic Substance Control Act).

The "presence or absence of retaliatory motive is a legal conclusion and is provable by circumstantial evidence even if there is testimony to the contrary by witnesses who perceived lack of such improper motive." *Frady*, supra, slip op. at 25, *citing, Ellis Fischell State Cancer Hospital v. Marshall* 629 F.2d 563, 566 (8th Cir. 1980). It is well settled also that a temporal proximity between protected activities and adverse actions may be sufficient to raise an inference of retaliatory motive. See, e.g., *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989)

The Secretary has held repeatedly that the Act covers former employees who seek reemployment and are not hired. *Cowan v. Bechtel Construction, Inc.* 87-ERA-29 (Sec'y Aug 9, 1989), slip op. at 2; *Samodurov v. General Physics Corporation*, 89-ERA-20 (Sec'y Nov. 16, 1993). On the other hand, Northeast contends correctly that the courts have observed that in enacting various employee protection laws Congress did not intend to "tie the hands of employers in the objective selection and control of personnel," citing, *inter alia, Hochstadt v. Worcester Foundation*, 545 F.2d 222, 231 (1st Cir. 1976). However, as noted further in *Hochstadt*, such rights of an employer must be balanced with the purpose of employee protection acts. *Id* at 231. *See*, *also*, *Frady*, *supra* at 17 ("An employer's failure to select a complainant for employment does not necessarily constitute and

adverse action, absent a discriminatory reason proscribed by law." (Emphasis added). It follows that an employer is not free to establish qualifications for a position which are designed to retaliate against a former employee because of prior protected activity.

With these principles in mind, I conclude that the Complainant engaged in activity protected by the Act by his raising concerns regarding the sump, the camera, the detection devices and the modesty clothing both internally and with the NRC. The concerns were considered serious enough to warrant

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investigation by NRC which noted that Northeast had planned or undertaken some corrective actions regarding these issues. Clearly, his filing and prosecution of the September 1994 complaint with the Department of Labor also involved protected activity. Accordingly, I will now proceed to consider each of the adverse actions alleged by the Complainant and determine whether any were in retaliation for any of these protected activities.

1. *The January 1984 Reduction in Pay.*

This alleged retaliatory act is time barred as the Complainant failed to file a complaint in regard thereto within 180 days of the reductions in his pay and grade. In any event, corrective action had been taken voluntarily by Northeast.

2. *The May 1994 Layoff.*

Although the 95-ERA-18 complaint was timely in regard to this action, I conclude that the Complainant has not established by the preponderance of the evidence that his layoff at this time was in retaliation for his having raised nuclear safety concerns. There was a substantial lay-off of Bartlett personnel at this time and the Complainant was one of the last to go. Furthermore, he has not demonstrated that anyone involved in selecting him for the lay-off was aware of the nuclear safety concerns that he had raised at this point.

3. *The One Day Hiring Delay in September 1994*

Again, I cannot conclude that the Complainant's not being reemployed by Bartlett until September 27, 1994 was in retaliation,for any prior protected activity. The problem was caused by t@e inaccurate resume, and, as previously noted, the Complainant was partially responsible for this problem. Additionally, any delay in resolving the problem can be attributed only to Bartlett personnel who were not then aware of the Complainant's prior raising of nuclear safety concerns.

4. *The December 9, 1994 Lay-off*

Contrary to what happened in May 1994, the Complainant was among the first to be let go in the December 1994 lay-off. This occurred subsequent to Department of Labor complaint and the proximity of the investigation of this complaint to his December

9 termination can not be overlooked. It came also at the conclusion of the NRC investigation which delved into the same issues that Strickland was aware of having been raised by the

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Complainant. Although the Respondents contend that he was among the first to be terminated because of his low ranking among the SHPs, the record shows that a SHP with a lower score was in fact retained past the Complainant. I recognize that by December 23 there was a lay-off of most of the Bartlett employees who were hired for the outage and it is reasonable to find that the Complainant would not have been retained beyond that date in any event. Consequently, I conclude that the Respondents retaliated against the Complainant only in regard to their failure to retain him in their employ between December 9 and December 29, 1994.

5. *The YC Outage*

Tingley has offered a creditable explanation as to why the Complainant was not hired for the YC outage to begin in January 1995, i.e., his status as a non-returnee scored him below the curt-off point. The Complainant has not offered evidence which raises a probability that such was not the case. Therefore, I conclude that his not being hired for this outage was not in retaliation for his protected activities.

6. *The Unit 3 Outage*

(a) *The Five Year Rule* - The first discussions regarding the Five year Rule reportedly took place on January 24, 1995, less than two weeks following the issuance of the NRC report which detailed its investigation of the concerns raised by the Complainant. It occurred also within 10 days of the Complainant's requesting a hearing on his DOL complaint. Even more significant, the actual implementation of the rule came less than a week after the scheduled hearing on this complaint at which, Regan, one of the instigators of the rule, was scheduled to testify. The temporal proximity lends credence to Drzewianowski's testimony supportive of the Complainant's contention that the rule was instituted to "keep him out." I find it more probable than not that such was the case.[13]

In reaching this conclusion I have considered the Respondents' contention that the Five Year Rule arose out of the Northeast's desire to rely on fewer contract personnel. However, the fact remains that more of Bartlett's employees were hired for Millstone at the time of the Unit 3 outage than had been the case in October 1994. Accordingly, the Respondents have not demonstrated by clear and convincing evidence that they would have instituted the Five Year Rule for the Unit 3 outage in the absence of the Complainant's protected conduct.

(b) *The Rule of 3*

[PAGE 18]

Here again, the rule was instituted with input by Regan within days of his scheduled testimony in 95-EPA-18.[14] Although the rule was purportedly instituted for the purpose of being more selective from the overabundance of available technician's, the record discloses that in order to complete the staffing for the outage, Bartlett had to resort to the recruitment of personnel it had not employed previously. Thus, the rule could not have applied to these applicants as there would have been no evaluation in place for them under Bartlett standards.

Even assuming that there was a legitimate business reason for the rule, I conclude that the Complainant's failure to meet the same was in retaliation for protected activity. The rating by Conwell was entirely subjective. It came also at the time of both the DOL investigation and the NRC audit. Of course there were incidents which involved friction between the Complainant and other employees that may have justified the "2" ratings. But, these occurred within a very short time frame in October 1994. The Complainant was counseled by Hiatt in regard to this behavior and things improved thereafter. Consequently, I conclude that it is more probable then not that the 11211 ratings were given in retaliation for Conwell having to be involved in the investigation of the 95-ERA-18 complaint. I note further that although Hiatt indicated a rather loose policy whereby a supervisor's evaluation could be changed if a personality conflict appeared to be involved, Bartlett failed to even entertain changing the rating because of the Complainant's allegation of a personality conflict with Conwell. Hiatt did testify further that he would not change the rating "knowing what he knows now." Such knowledge would necessarily include the Complainant's protected activity in filing and prosecuting the complaint in 95-ERA-47.

In reaching my conclusions, I have taken into account also Bartlett's offer to employ the Complainant at Pilgrim. However, as such offer involved separation from his family, it can not be considered as being under the same terms and conditions of the employment he was refused.

REMEDIES

No testimony or other evidence was offered at the hearing regarding the actual damages suffered by the Complainant because of the Respondent's alleged retaliatory acts. I requested that the parties attempt to stipulate as to these damages and present any such stipulations to me post-hearing. None has been

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forthcoming as of this date. Because of my impending retirement, there is not sufficient time for me to reopen the record on the issue of the actual dollar amount of damages. Consequently, I will recommend an order to the Secretary that sets forth the nature of the remedied which I believe should be awarded and leave open the dollar amount for any further proceeding which may be necessary subsequent to the Secretary's review. In recommending these remedies, I have taken into consideration the

temporary nature of the work in which the Complainant has chosen to engage.

RECOMMENDED ORDER

1. The Respondents jointly shall pay the Complainant the wages to which he would have been entitled if he had been retained in their employ from December 10, 1994 to December 23, 1994.

2. The Respondents jointly shall pay the Complainant the earnings that he would have earned as a SHP during the Spring 1995 Unit 3 outage based on the period when the majority of SHPs had reported to work for this outage and ending when the majority had been terminated for the same.

3. Bartlett shall correct the Complainant's December 9, 1994 Performance Evaluation to reflect a minimum rating of at least 11311 in all categories.

4. Neither Northeast nor Bartlett shall deny future employment to the Complainant because of his having engaged in protected activities.

5. Neither Northeast nor Bartlett shall give a less than satisfactory reference to or relate the Complainant's engagement in protected activities to any prospective employer of the Complainant.

6. The Respondent's shall pay for the Complainant's expenses in prosecuting his DOL complaints, including reasonable attorney fees.

JOEL R. WILLIAMS
Administrative Law Judge

NOTICE: This recommended Order and the Administrative file in this matter will be forwarded for review by the Secretary of Labor to the office of Administrative Appeals, U.S. Department of Labor, Room S-4309, Francis Perkins Building, 200 Constitution Ave., N.W., Washington, D.C. 20210. The Office of Administrative Appeals has the responsibility to advise and assist the Secretary in the preparation and issuance of final decisions in employee protection cases adjudicated under the regulations at 29 C.F.R. Parts 24 and 1978. *See* 55 Fed. Reg. 13250 (1990).

[ENDNOT ES]

[1]
Because the caption used by Wage and Hour when this Office was notified of this complaint named only Northeast as the Respondent, Bartlett was not named as a party in regard to this hearing.

[2]
I had requested that this document be made a part of the record in this case.

[3]
Strickland defined "health physics" as "the science of radiation protection and all of the different attributes of it, which include everything from off-site dose calculations to protection of workers in the field."

[4]
Outages have been described by Strickland as being of two types. One is a scheduled refueling outage where the reactor is disassembled, pent fuel is removed, new fuel is installed and reassembly takes place. During this time preventive and corrective maintenance activities take place throughout the unit. The other type is a forced outage do to equipment failure and can last anywhere from a day to many months.

[5]
Sachetello describes a decontamination technician as one who keeps a nuclear facility in a 'housekeeping aspect" by sweeping floors, washing equipment and decontaminating any exposed areas.

[6]
Presumably Sachetello

[7]
There is a dispute as to who was responsible for the error. The Complainant maintains that the resume was prepared by someone at Bartlett based on the records in a 3 ring notebook which he had furnished to Conwell. Conwell testified that the Complainant had submitted the resume to him already prepared. D'Angelo testified that the resume was not in the usual format used by Bartlett. Nevertheless, I do not consider it necessary to determine who prepared the document as I consider any error therein to be inadvertent rather than deliberate. It is obvious to me that the Complainant would not attempt to misrepresent his experience to Bartlett knowing that they had the actual records of his employment. On the other hand, I do not believe that Bartlett would intentionally present a prepared resume to the Complainant for his review with obviously false information. If anything, their is contributory negligence on the part of both parties.

[8]
The delay was purportedly due to the temporary absences of Conwell and Hiatt from their respective offices as well as the inability of the Complainant to fax a new resume to Bartlett.

[9]
This was due to his having furnished information on these issues to Miller and Chatfield.

[10]
Strickland's testimony indicates that some of these terminations could have been voluntary.

[11]
Other instructions pertaining to the use of the form are contained in an August 15, 1995 Page 2 revision and are not shown to have been in effect prior thereto.

[12]
They were so identified in the List of Witnesses which Northeast filed in 95 ERA 018 on February 17, 1995 and which is considered part of the official file in that case.

[13]
The record does indicate that at least two other SHPs were effected by the rule. However, their elimination was based on a legal opinion from Northeast's General Counsel rather than merely a determination by Bartlett's Personnel Administrators that they were not qualified. It appears that there was a conscious effort to give an appearance of the uniform application of the rule in order not to jeopardize the Respondents, legal position in this case.

[14]
Northeast's then counsel complained that his witnesses had to take time from their work to appear at the hearing to no avail.